

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CHARLES DOUGLAS STRICKLAND,)	
	)	Case Nos. S-CE-631-S
Charging Party,	)	S-CE-632-S
	)	S-CE-633-S
v.	)	S-CE-635-S
	)	S-CE-636-S
STATE OF CALIFORNIA (DEPARTMENT)	
OF GENERAL SERVICES),	)	PERB Decision No. 1063-S
)	
Respondent.	)	October 27, 1994
_____)	

Appearances: Charles Douglas Strickland, on his own behalf;
State of California (Department of Personnel Administration) by-
Linda A. Mayhew, Labor Relations Counsel, for State of California
(Department of General Services).

Before Blair, Chair; Caffrey and Garcia, Members.

DECISION AND ORDER

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Charles Douglas Strickland (Strickland) to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). In his proposed decision, the ALJ dismissed Strickland's charge in which he alleged that the State of California (Department of General Services) (State) unlawfully denied him a lateral transfer to the Long Beach office in violation of section 3519(a) of the Ralph C. Dills Act (Dills Act).¹

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

It shall be unlawful for the state to do any
of the following:

(a) Impose or threaten to impose reprisals
on employees, to discriminate or threaten to

The Board has reviewed the entire record in this case, including Strickland's exceptions and the State's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be without prejudicial error and, therefore, adopts them as the decision of the Board itself.

The complaint and unfair practice charges in Case Nos. S-CE-631-S, S-CE-632-S, S-CE-633-S, S-CE-635-S and S-CE-636-S are hereby DISMISSED.

Members Caffrey and Garcia joined in this Decision.

discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CHARLES STRICKLAND,)	
	)	Unfair Practice
Charging Party,	)	Case Nos. S-CE-631-S
	)	S-CE-632-S
v.	)	S-CE-633-S
	)	S-CE-635-S
STATE OF CALIFORNIA (DEPARTMENT	)	S-CE-636-S ¹
OF GENERAL SERVICES),)	
	)	PROPOSED DECISION
Respondent.	)	(10/15/93)

Appearances; Charles Strickland, in propria persona; Linda A. Mayhew, Labor Relations Counsel, Department of Personnel Administration, for the State of California (Department of General Services).

Before JAMES W. TAMM, Administrative Law Judge.

PROCEDURAL HISTORY

On September 16, 1992, Charles Strickland (Charging Party or Strickland) filed the above listed unfair practice charges against the Department of General Services (DGS), alleging a wide range of criminal conspiracies to establish and maintain an unlawful supervisory structure, to terminate his employment, to dock his pay, to fraudulently create and release evidence of irrational behavior on his part, to invade his privacy, to establish racial favoritism, to violate his civil rights and to deny him a transfer.

On February 19, 1993, the general counsel's office of the Public Employment Relations Board (PERB or Board) dismissed all but two of the allegations in the above listed cases. A complaint was issued alleging Strickland was unlawfully denied

¹The above listed cases were consolidated on March 18, 1993.

lateral transfers to the Van Nuys and Long Beach offices of DGS in violation of section 3519(a) of the Ralph C. Dills Act (Dills Act).²

A settlement conference was held, however, the parties were unable to resolve their dispute. Sixteen days of formal hearing were held. At the conclusion of the hearing, the allegation involving the Van Nuys transfer was withdrawn. The parties waived transcripts and briefs, and made oral arguments on record. The case was submitted for decision on September 2, 1993.

ISSUE

Was Charles Strickland denied a lateral transfer to Long Beach due to his protected activity?

FINDINGS OF FACT

Regional Operations

Charles Strickland is a stationary engineer in the Los Angeles Metro Region of the Office of Building and Grounds (OBG) within DGS. OBG is responsible for the operation and maintenance of state office facilities in the Los Angeles metropolitan area. For most of his employment, Strickland has been assigned to the state building at 107 South Broadway.

²The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3519(a) provides that it shall be unlawful for the State to:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Stationary engineers are also permanently assigned to other large state facilities. The small facilities however, are serviced by a road crew, which travels from building to building, as needed. Stationary engineers on the road crew tend to gain experience in a wider variety of heating, ventilation and air conditioning (HVAC) systems.

The first level supervisor for stationary engineers is the Chief Engineer II (CE II). During most of the time pertinent to this complaint, CE IIs where Strickland worked, reported to building manager, Bobbio Sanchez. Sanchez reports to regional manager, Mel Gilliard.

Until August 30, 1991, Gilliard's responsibility extended throughout most of Southern California. At that time, the LA Metro Region was separated from the rest of Southern California. Gilliard retained authority over the LA Metro Region and Richard Steuber became regional manager for the Southern Region. Both Gilliard and Steuber report to assistant chief of OBG in Sacramento, Ron Neal, who reports to Rosomond Bolden, chief of OBG.

Sharion Jenkins is currently the OBG building manager in Long Beach. She reports to Steuber. From October 1989 until September 1991, Jenkins worked in Los Angeles first as an assistant to Gilliard, then Sanchez.

Numerous witnesses testified that Gilliard retains control over all personnel decisions in the LA Metro Region. Very few personnel decisions, such as building or shift assignments of

stationary engineers, were ever delegated from Gilliard to his subordinates.

Steuber, on the other hand, delegates those types of decisions to building managers. For example, when the stationary engineer vacancy occurred in Long Beach, Steuber played no role in the selection process, other than approving the filling of the vacancy.

Steuber and Gilliard do not have a close working relationship. They do not seek each other's advice, nor try to influence decisions regarding each other's regions.

There was no credible evidence that Neal or Bolden involved themselves in the hiring decisions in either of the regions.

Strickland's Complaint Activity

For most of approximately the last 9 years, Strickland has been engaged in a consistent pattern of filing complaints³ within numerous forums against OBG managers and supervisors. Although not a complete list by any means, examples of the issues are listed below.

In 1984, Strickland represented himself and several other employees in a dispute against Gilliard. The employees alleged that Gilliard had manipulated the scheduling of stationary engineers during the 1984 Olympics in order to deprive employees of overtime. Strickland also claimed that Gilliard had given

³In filing complaints, Strickland often used the state's standard employee grievance form. Strickland deleted any reference to a union and entitled the grievance "Non Union Complaint Material."

orders that timesheets of certain employees should be falsified, and then later destroyed the timesheets in an attempt to conceal the unlawful actions.

A grievance was filed, however, the matter was not settled to Strickland's satisfaction. Strickland continued to pursue the matter by filing additional complaints and allegations stemming from this incident. He alleged fraud, corruption and criminal conspiracies among Gilliard and other top OBG management. Strickland filed these additional complaints and allegations with the State Auditor General, the State Attorney General, Assemblywoman Delane Easton, the California State Personnel Board, the California State Police and the Los Angeles District Attorney. None of those agencies/individuals receiving the allegations took any action based upon the information provided by Strickland.

In June 1985, Strickland ran for the position of union steward with the International Union of Operating Engineers (IUOE).⁴ Although Strickland was unopposed on the ballot, he was never officially appointed as union steward for reasons which are not clear in the record. After the election, but prior to learning that he was not being appointed as steward by the union, Strickland, purporting to be the IUOE union steward, filed at least one grievance.

⁴The IUOE is the exclusive representative of State Bargaining Unit 13, which includes stationary engineers.

In late 1985 and early 1986, Strickland filed EEO complaints and complaints with the State Personnel Board concerning the promotion of Gloria Logan to the position of Chief Engineer I (CE I). OBG treats the CE I position as a lead position within the bargaining unit. Strickland alleged that OBG management manipulated the hiring process to promote Logan, a black female, over himself, a white male, for affirmative action policies which favored black and female employees. Strickland also notified OBG that he would file a court action against the department if he was not transferred from Logan's work crew. Strickland's complaint was denied by the State Personnel Board, however, the department did accommodate his transfer request.

In February 1986, Strickland felt he was being harassed by his immediate supervisor, James Jordan. Strickland threatened to sue several members of management (including Gilliard, Sanchez, Jordan and Bolden) in Federal Court, if he was not transferred from Jordan's crew. Sanchez met with Strickland and arranged a transfer a few days later.

In early 1988, Strickland's supervisor had all the chairs removed from the stationary engineer's office, in what appeared to be retaliation against Strickland. Strickland and others complained and the chairs were ordered replaced by Gilliard.

In 1990, Jordan removed the dial from the telephone used by Strickland, in order to prevent Strickland from making outgoing calls to the State Personnel Board. Strickland and others protested to Gilliard, who had the dial replaced.

In early 1990, Strickland was told he would be temporarily transferred to the road crew to help cover for stationary engineers who would be on jury duty. Strickland objected, claiming he did not have a valid driver's license due to a DUI arrest. Sanchez obtained Strickland's driving restrictions from the DMV and believed Strickland did not have the restrictions as he had originally claimed. Nevertheless, the OBG did not transfer Strickland at that time.

In May of 1990, Strickland was one of several employees who filed a grievance claiming that they were being transferred to new work locations as retaliation for, among other things, earlier EEO complaints, and the complaints regarding overtime during the 1984 Olympics referred to above. Strickland requested that the State Personnel Board investigate the matter and hold a hearing regarding the claims of retaliation, as well as general claims of corruption and mismanagement within the department. The State Personnel Board declined to take any action.

In May 1990, Strickland received an incoming phone call from a representative of the State Personnel Board regarding one of his earlier complaints. When his supervisor, James Jordan, saw Strickland on the phone, he became loud and hostile and began yelling and swearing at Strickland to stop using the phones. That lead to an extremely angry confrontation between Jordan and Strickland, which probably would have become violent, had not others intervened. Strickland complained to OBG management about the incident and also complained to the State Personnel Board

that OBG management was continuing to harass him. The State Personnel Board took no action regarding Strickland's complaint on this matter, however Gilliard did provide Strickland with access to a telephone for his discussions with the State Personnel Board.

In August of 1991, Strickland attempted to obtain a change of address form. He had moved twice in one week and his second request for a change of address form had been either ignored or forgotten by his supervisor. Unsuccessful at getting the form from his supervisor, Strickland went to Sharion Jenkins to request the form. Jenkins, feeling that Strickland was using any excuse he could think of to come see her and take up her time, became upset with Strickland, told him to go through proper channels and refused to deal with the issue. Strickland then barged into Jenkins office and the conversation escalated into a very loud confrontation. Jenkins called Strickland unreasonable for expecting immediate responses to his requests. That enraged Strickland who began yelling about the endless stupidity of the management staff.

Attracted by the loud argument, others intervened to try to end the dispute. Jenkins threatened to call the State Police and have Strickland removed from her office if he did not leave.

Strickland did leave, but later filed a complaint with the State Police himself. Strickland wanted the State Police to inform Jenkins that she could be civilly liable for threatening to call the State Police to have Strickland removed from her

office. The State Police, however, did not accommodate Strickland's request.

In September of 1991, the IUOE union steward, Sharon Hayden, filed a grievance on behalf of Strickland, alleging that Strickland's shift had been changed from the day shift to the early a.m. shift in a deliberate attempt to restrict Strickland's ability to file complaints with OBG management.

In December 1991, Strickland represented himself and several other employees in protesting the department's posting of employee home telephone numbers. OBG eventually agreed to discontinue the practice.

Over the years, Strickland has filed numerous health and safety violation claims against the department. Some examples, which are not meant to be constitute an exhaustive list, are described below.

In September 1984, Strickland objected to a sludge removal assignment, which Strickland felt could contain bacteria and toxic chemicals. Instead of completing the work as assigned, Strickland contacted the toxic substances division of the California Department of Health Services and requested that they investigate the substance.

Strickland once contacted the State Fire Marshal's office because he was upset about how repairs to fire dampers were being handled. The Fire Marshal temporarily stopped the repair work until the department demonstrated that the repairs were being done in accordance with manufacturing specifications.

In 1991, Strickland filed a complaint alleging unlawful asbestos abatement practices.

Strickland filed numerous complaints that OBG management was ignoring evidence that the water system at the Los Angeles state building at 107 South Broadway was contaminated with poisonous chemicals. This particular issue seemed to trigger more conflicts between Strickland and OBG than all the others combined. There were a series of angry disputes about whether the water was safe and whether enough was being done to locate and fix the cause of any contamination. Strickland tried to raise the issue with anyone who would listen to him, as well as some supervisors, such as Sanchez, who were tired of listening to him. For a short period of time, bottled water was provided to state employees in the building.

As building manager of 107 South Broadway, Sanchez had primary responsibility for the problem. In his testimony, which was contradictory and not credible, he maintained the problem was never as great as Strickland made it out to be and was corrected without hazard to state employees. Strickland, on the other hand, envisioned a complex ongoing criminal conspiracy on the part of Sanchez, Gilliard, Jenkins and Neal to cover up an extremely hazardous, ongoing condition.

Over the years, Strickland has also engaged in a longstanding dispute about the status of CE Is. When PERB issued

its unit determination decision in 1981,⁵ CE Is were held not to be supervisors and were included in the unit. The Board found that since building managers made actual hiring decisions, CE I participation in the process which was limited to evaluating the technical qualifications of applicants, did not establish supervisory authority. The Board also determined that CE Is would regularly oversee the assignment of work to other employees, but, that this responsibility did not entail the independent judgement required by the Dills Act in order to exclude them from the bargaining unit as supervisors.

Strickland continued to believe, however, that CE Is were being used in a supervisory role and should be excluded from the unit. He objected to taking direction from any member of his own bargaining unit and raised the issue on numerous occasions. For example, in 1989, Strickland filed a complaint against Gilliard with DGS and the Attorney General. The complaint alleged corruption and abuse of authority, and argued that Gilliard was creating a privileged class of non-management level employees, who were allowed to harass and abuse others. This complaint was based upon DGS's use of CE Is as lead persons.

In 1991, Strickland claimed his privacy was being invaded because pay warrants were being distributed to employees by

⁵In the matter of: Request for Reconsideration and Supplemental Decision and Order. Unit Determination for the State of California (1981) PERB Decision No. 110-d-S (State Unit Determination).

CE Is and that a CE I had hand-delivered a private unsealed document to Strickland, which had been faxed to Strickland from the DGS office in Sacramento.

The most recent incident involved DGS' long standing practice of having CE Is participate on interview panels as technical experts. This incident will be more fully discussed later in this decision.

Typically, when Strickland's complaints were not resolved to his satisfaction in a timely manner, he made additional complaints against management, claiming that they were engaging in acts of criminal conspiracy. Often Strickland threatened to hold those involved civilly liable in court if they would not accede to his demands. Strickland also typically requested a "Right to Sue Release" from the California Department of Personnel Administration, which Strickland believed would allow him to file a tort action against DGS. As a general pattern, each round of communication from Strickland became more vitriolic than the previous one.

All of these complaints/allegations were well documented with copies usually served on OBG supervisors and managers.

Strickland's Interpersonal Skills

Strickland was described by witnesses as tenacious, persistent, single minded, unrelenting and uncompromising in his desire to achieve his goals and pursue his complaints. Along with his persistence, however, the record is overwhelmed with evidence from almost a dozen credible witnesses called by

Strickland himself, that Strickland was emotionally erratic and routinely verbally abusive of co-workers, supervisors and managers. Strickland frightened other workers by engaging in yelling matches with his supervisors and actions such as slamming his fist down on the table or barging into offices with his demands. On more than one occasion, Strickland came perilously close to physical violence, although there is no evidence that he ever crossed that line, or that he ever deliberately provoked such an incident.

In September 1991, a series of letters written by Strickland to Neal, Gilliard, Sanchez and Jenkins, alarmed OBG enough that they had Strickland referred to a psychiatrist for a Fitness for Duty Evaluation. The most prominent of the letters was written in free form blank verse and was referred to in the hearing as the "Dragon Slayer" letter. The rather disjointed letter refers to Gilliard as a dragon and to Strickland as Saint Chuck. It ends as follows:

We will learn to communicate or comes the
16th, Mel [Gilliard] and I will play some
"Dragon Slayer" games, and that me buckos is
God's own truth.

Strickland explained the letter as a badly misunderstood attempt at humor.

It should also be noted, however, that Strickland could be as personable, interesting and charming as he was rude, abusive and obnoxious. He occasionally sent flowers to female employees because he felt he may have frightened them. Furthermore, he did not engage in offensive behavior in a vacuum. Many of his

outbursts were escalated, if not deliberately provoked, by supervisors and/or managers.

Work Atmosphere

Numerous witnesses testified about the work atmosphere where Strickland was employed. The picture painted is a workplace seething with tension and lack of respect between and among employees, supervisors and managers. Arguments laced with profanity as well as threats of physical violence appear to be common occurrences. Bomb threats have been made against certain supervisors, and fist fights have occurred. Supervision of employees appears to be either inconsistent or non-existent. Supervisors are routinely undermined by both employees and upper management. Upper management is also routinely undermined by supervisors and employees. There seems to be almost unanimous agreement among witnesses employed at that location that it is simply a horrible place to work.

Relationship Between Strickland and Jenkins

Jenkins came to Los Angeles OBG in approximately October 1989. She was an assistant to Gilliard until August 1990, when she became an assistant to Bobbio Sanchez. She remained in that assignment until September 1991, when she was promoted into the position she now holds in Long Beach. At various times during her stay in Los Angeles, Jenkins had responsibility over certain EEO issues, some health and safety areas, and occasionally filled in for Sanchez or Gilliard in their absence. Jenkins worked with

Strickland on numerous issues, including some health and safety issues, training, EEO, and some of Strickland's grievances.

Jenkins testified that she felt that at least half the time Strickland's claims on health and safety issues had potential merit, so she tried to give him the benefit of the doubt whenever he raised an issue. At the hearing, Strickland sought to show that his ongoing complaints about contaminated water reflected badly upon Jenkins, who at the time was an assistant to Gilliard and Sanchez. Jenkins did not appear to be particularly upset at Strickland for raising the issue, however, because she felt it was not within her area of expertise or responsibility. She also testified that she often agreed with Strickland's health and safety complaints. At one point, she even tried to talk Strickland into serving on a health and safety committee.

She also felt, however, that Strickland would use any excuse he could think of to spend time with her for his own personal reasons. She testified that for a while it seemed that she had a homing device on her, because every time she made a move, Strickland was there trying to see her. According to Jenkins, if she went for coffee, Strickland came up to her in the cafeteria. If she went into the hall, Strickland was waiting for her. If she went to the restroom, Strickland would be waiting around the corner for her when she came out.

Several witnesses testified that they felt Strickland was paying an inordinate amount of attention to Jenkins because he was attracted to her rather than for work related concerns.

Jenkins was often approached by other employees who suggested that she put up with too much abuse from Strickland. One employee offered, only half in jest, to supply Jenkins with a stun gun to keep Strickland away from her. For a while, Jenkins was even removed from Strickland's chain of command in order to eliminate his need to contact her. This move appeared to be only marginally successful in diverting Strickland's attention from Jenkins. Jenkins testified that, after a while, they were able to resolve the issue of Strickland paying personal attention to her, and their relationship then continued on a professional basis.

The evidence supports a finding that, while Jenkins may not have respected Strickland as an employee, and was frustrated by his inappropriate personal attention and the abusive manner in which he often presented his complaints, she does not personally dislike him and holds no personal grudge against him. In fact, with very few exceptions, such as the time Jenkins threatened to call the state police to have Strickland removed from her office, Jenkins demonstrated a willingness to put up with more from Strickland than anyone else who had to deal with him on a regular basis.

The Long Beach Transfer

When Jenkins assumed her new position in the Long Beach office in September of 1991, she became responsible for the maintenance program in the Long Beach state office building and nine other state facilities located from Bellflower to Long

Beach. When Jenkins arrived, the hiring process for a stationary engineer vacancy was already under way. The position had been vacant for some time due to a hiring freeze, but filling the opening had recently been approved. Jenkins received an eligibility list and contacted the candidates in the top five ranks to determine their interest in the position.

Jenkins was looking for a candidate with dependability, flexibility, strong inter-personal skills and technical skills with a strong emphasis on electrical matters. She testified in a convincing manner that those traits were desired because Long Beach had a very small staff and teamwork was essential to success. The individual selected would be interacting with numerous high ranking officials in the ten state office facilities they serviced. Furthermore, the electrician in Long Beach was ranked high on the promotional list for stationary engineer and was likely to be promoted in the near future.⁶ If the electrician was promoted away from Long Beach, and the job could not be backfilled due to budget constraints, Jenkins particularly needed a stationary engineer with strong electrical skills to help fill in for any vacant electrician position.

Four candidates on the promotional list, and Strickland, a lateral transfer request, expressed an interest in the Long Beach

⁶Stationary engineer is a higher rated classification than electrician.

position.⁷ All five of the interviews were conducted in the same manner by Jenkins and Robert Langley, the CE I at Long Beach. All candidates were asked the same structured questions. Questions regarding technical issues had been prepared by Langley.

When Strickland first learned of the opening, he called Jenkins to indicate his interest in the position. At that time, Jenkins questioned whether they could successfully work together, but she did indicate her willingness to interview him. Jenkins informed Strickland that if he transferred to Long Beach, he would be taking direction from a CE I. She also told Strickland that a CE I would be participating on the interview panel as her technical expert. Jenkins told Strickland to submit an application, which he did.

Strickland's cover letter attached to his application indicated he was making a "qualified" request to be considered for the transfer. He strenuously objected to the use of CE Is in the interview process. He stated that any role of a CE I outside of a "purely assistive nature related directly to particular engineering problems" was unlawful. Strickland stated that unless he was given "a specific showing of lawful authority" allowing the CE I any input into his transfer request, he would not submit to the interview. Strickland felt his experience had already been established and was not open to evaluation by any

⁷The past practice of DGS allows building managers to select candidates from promotional lists or lateral transfers. Neither are given any preference over the other.

member of the IUOE. Strickland reiterated at least a half-dozen times that CE I participation on the interview panel was illegal.

Jenkins did not respond to Strickland's letter, other than to schedule an interview and send Strickland a notice of the interview.

On February 3, 1992, Strickland sent a complaint to Jenkins indicating that she left him no other recourse than to proceed with a civil tort action to protect his rights. The same complaint also requested a "Right to Sue Release" from the California Department of Personnel Administration.

After Strickland's earlier conversation with Jenkins regarding CE I participation in the interview panel, he filed a complaint with OBG. Strickland argued that allowing CE I's any influence at all in the interview process would make them defacto supervisors. This, according to Strickland, was a violation of state law, which prohibited supervisors from being in his bargaining unit. Strickland sought to have all the interviews involving CE Is voided. The 15-page complaint also contained some vintage Strickland vitriol, as follows:

. . . [CE I's] may be outstanding people with superior skills, and I do not have knowledge otherwise; but they are not "supervisors," and I have no intention of allowing Sharion Jenkins or anyone to self create "Bosses" who can control my career on a level of slavery, because she is impressed with a grandiose title.

Jenkins has suggested such condition should I seek employment in Long Beach, and any conception that I will submit to such conditions of employment, or will merely allow my State career to be held in limbo

because a Building Manager wishes to exceed her authority, is in error on both counts.

If my superiors wish to make the Chief Engineer I employees, full supervisors, kindly remove them from my Union.

If Jenkins wishes to make "Bosses," I can only suggest she move to Mississippi, and turn the clock back a hundred years.

On the day of Strickland's scheduled interview, Langley called in sick, so no interview was held. When Strickland arrived for the interview, he and Jenkins went to the cafeteria and had coffee together. At that time, she made it clear to Strickland that the department's long standing practice was to have CE Is sit on interview panels as technical experts, and that Langley would participate in Strickland's interview.

Strickland's interview was rescheduled for a date in February for Strickland's convenience.⁸ At the start of his February interview, Strickland handed Jenkins and Langley a letter indicating that he had no intention of bringing any legal action against either of them personally and that any civil liabilities that might occur due to CE I participation in the interview process, would be limited to senior managers and union officials.

⁸The long standing practice of DGS is to require employees interviewing for lateral transfers to do so on their own time. Strickland had exhausted his leave balances, so Jenkins agreed to hold off her decision for approximately a month, until Strickland could build up enough leave time to attend the interview without suffering a loss of pay.

After Jenkins and Langley conducted the interviews and evaluated the results, both Langley and Jenkins agreed that one candidate was clearly far superior to all the others. He had the best qualifications due to extensive experience in HVAC and electrical systems. He had once been an instructor and an inspector in the field. He was in the fifth rank on the eligibility list, however, and was not reachable because the first three ranks had not yet been cleared.

Jenkins' second choice was Augustine Gabilan, who was at that time the Long Beach electrician Jenkins was worried about losing through a promotion to a different location. Gabilan had a bachelor's degree in electrical engineering from the Philippines. During his tenure at Long Beach, Gabilan was constantly taking night courses regarding HVAC systems. He was seen as a perennial student, always seeking to increase his work knowledge. He also had a proven record of dependability and inter-personal skills, having already established working relationships with the very clients he would have to service as a stationary engineer. Gabilan had also regularly proven his flexibility and commitment to the job by his willingness to adjust his work schedule to meet work emergencies whenever they arose. Gabilan was in the third rank and was therefore reachable.⁹

⁹Several times during the hearing, Strickland argued that Gabilan did not meet minimum eligibility requirements to interview for the position. Strickland's arguments were, however, based entirely upon his own speculation and were not supported by a shred of evidence. Therefore, no additional time

In evaluating Strickland's technical expertise, Langley rated Strickland as his last choice. There is no evidence of any bias against Strickland on the part of Langley. Langley testified that he and Strickland had worked together only very briefly some time ago. Although Strickland had a reputation of being a thorn in everyone's side, Langley recalled that Strickland seemed like a nice guy at the time, and that Strickland had treated him fairly and honestly.¹⁰

Based upon her recollection of Strickland's work in Los Angeles, Jenkins felt that Strickland tended to make excuses for not being able to complete tasks, had not shown an ability or willingness to adjust to changes in work assignments, had very poor inter-personal skills and had very limited field experience. Strickland's lack of field experience on the road crew was significant to Jenkins because the work in Long Beach, being so spread out with a limited number of staff, requires troubleshooting experience on a wide range of HVAC systems.

will be spent dealing' with this claim in the discussion section of this decision.

¹⁰Although the Van Nuys allegations were withdrawn at the conclusion of the hearing and therefore not reviewed in this decision, Strickland's technical expertise was also rated very low in the Van Nuys interview, consistent with Langley's opinion. The CE I participating in the Van Nuys interview felt Strickland had trouble answering even the most basic of technical questions. The purpose of this finding is not to decide if Langley was correct about Strickland's lack of technical expertise, but only if there is evidence to conclude that the low opinion of Strickland's skills was arrived at due to his protected activities. I therefore make no finding about Strickland's technical skills, only that Langley's low opinion of Strickland's skills seem to be sincere and based upon Strickland's performance in his interview.

Jenkins was also aware that Strickland had no sick leave or vacation time balances. She judged that to be an indication that he was often absent from work and, therefore, less dependable. She was unaware that Strickland had recently had three operations and was being treated for stress, thus exhausting his leave balances.

Jenkins had worked with both Gabilan and Strickland and rated Gabilan superior to Strickland regarding work experience, training, dependability, flexibility, and inter-personal skills. Furthermore, given Strickland's history of seeking to dominate Jenkins attention, along with his pre-announced refusal to accept any CE I authority over his conditions of employment, Jenkins feared Strickland would once again use any excuse to bring issues directly to her. Jenkins worried that Strickland might dominate her time, rather than working through a chain of command.

Jenkins did not discuss the application or qualifications of any of the candidates with Steuber, Neal, Bolden, or Gilliard, prior to her decision to select Gabilan. Nor is there any credible evidence that any of these individuals tried in any way to influence Jenkins decision not to hire Strickland.

Strickland testified that in 1990 he indicated to OBG management that he was planning on retiring when he turned 50. Later, Strickland determined that the amount of his retirement would be insufficient, therefore, he changed his mind. Neither Strickland's announced intention to retire, nor his change of

plans, appear to have made much of an impact, one way or the other, on any of the supervisors or managers at OBG.

On February 25, 1992, IUOE Business Representative Lloyd Ramirez, wrote to Gilliard on Strickland's behalf, inquiring about what criteria Jenkins used to promote an electrician into the vacancy, rather than giving it to Strickland, who was a lateral transfer. Gilliard responded on March 16, 1992, that Article XIII of the Collective Bargaining Agreement allowed for the selection process used to fill the vacant Long Beach position.

DISCUSSION AND CONCLUSION

In order to prove a prima facie violation, the Charging Party must prove: (1) that he engaged in protected activity; (2) that OBG management had knowledge of his protected activity; (3) that OBG took adverse action against him and (4) that OBG took the adverse action against him because he had engaged in that protected activity. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S.)

Once the Charging Party has done that, the burden then shifts to DGS to prove that it would have denied Strickland the transfer to Long Beach regardless of any protected activity. If, however, the Charging Party has not proven a prima facie case, the burden does not shift to DGS and it is under no obligation to

put forth any evidence. I will briefly review the elements of Charging Party's case.

Protected Activity

The first requirement is that Strickland engaged in protected activities. There is ample evidence to support a finding that Strickland engaged in protected activity. Although many of Strickland's complaints, such as those filed with the State Personnel Board, the Attorney General, Los Angeles District Attorney, etc., might not be protected by SEERA,¹¹ much other activity, such as filing health and safety complaints, grievances regarding overtime, complaints of retaliatory transfers, disputes over confidentiality of home telephone numbers and pay warrants, etc., are clearly protected.

There was a tremendous overlap between Strickland's protected and unprotected conduct. For example, filing a grievance regarding the denial of overtime for the 1984 Olympics is protected. However, when he filed complaints based upon the same incident with the attorney general and the Los Angeles district attorney, seeking broad based investigations into "criminal acts," Strickland's activity probably crossed the line into areas unprotected by the Dills Act. However, ample evidence was presented to conclude that Strickland would have been denied

¹¹San Diego Unified School District (1991) PERB Decision No. 885, pp. 74-75 (filing Equal Employment Opportunity Commission complaint unprotected); Regents of the University of California (Yeary) (1987) PERB Decision No. 615-H (filing a California Department of Fair Employment and Housing claim not protected activity).

the transfer regardless of any protected activity. Therefore, I find it unnecessary, with one exception, to articulate the dividing line between his protected and unprotected conduct.

That exception is Strickland's activity regarding CE Is. There are two issues here. The first involves CE I participation as technical experts on interview panels. In State Unit Determination, supra, the same decision which placed CE Is in the bargaining unit, PERB held that it was not improper for bargaining unit members to participate on interview panels.

(See also Foothill DeAnza Community College District (1977) EERB¹² Decision No. 10 and San Rafael City Schools (1977) EERB Decision No. 32.) However, in at least a half dozen places on Strickland's "qualified" request to transfer, he indicated that any CE I participation in the interview process would be considered by him to be a violation of the law. In his February 3 letter to Jenkins, Strickland stated that he saw no recourse open to him other than to proceed with a civil tort action.

The second issue regarding CE Is, was Strickland's objection to any role for a CE I other than "a purely assistive nature related directly to particular engineering problems." PERB has clearly decided that it was not improper for CE Is to oversee the work assignments, to some degree, of other bargaining unit employees.

¹²Prior to 1978, PERB was known as the Educational Employment Relations Board.

Thus, while it may have been protected for Strickland to advocate the removal of CE Is from the bargaining unit, his stated intention to proceed with a civil tort action regarding CE I involvement on the interview panel and his refusal to take direction from a CE I, are not protected by the Dills Act.

OBG Knowledge

The second element that Strickland must prove is that management had knowledge of his protected activity. This element was also proven. As a general practice, Strickland meticulously brought his complaints to the attention of the entire OBG management, along with any supervisors involved.

Adverse Action

The third element, that adverse action occurred, was not disputed by the state. Counsel for DGS conceded that the denial of the transfer impacted Strickland's ability to move to Long Beach and/or his commute.

Nexus

The final element that Strickland must prove is that the state was motivated, at least in part, by his protected activity. Since an employer's motivation can seldom be proven by direct evidence, unlawful motivation can often be inferred from circumstantial evidence. Here, however, Strickland has failed to prove by either direct or circumstantial evidence that Jenkins denied him the transfer due to his protected activity. There was no evidence of disparate treatment against Strickland or a departure from established practices. There was no credible

evidence of shifting justifications by the employer. There was no evidence that Jenkins based her decision upon inadequate information or that she made a final decision prior to completing Strickland's interview.

There was no evidence whatsoever of bias against Strickland on the part of Langley. Rather evidence indicates that Langley based his evaluation on a sincere belief that Strickland lacked technical competence compared to other candidates. Strickland had limited experience on a road crew and did not have as strong a background in electrical work as Gabilan.

Jenkins had a reasonable fear that Strickland would not work well with the CE I. Strickland's announced refusal to take direction from a CE I was not protected conduct and was a legitimate factor to be taken into consideration by Jenkins. Strickland also had a long standing and relatively consistent history of an inability to develop constructive working relationships with supervisors.

Finally, Jenkins had first hand knowledge of Strickland's lack of inter-personal skills. She had personally experienced his rude and abusive behavior.

In summary, the evidence supports Jenkins' testimony that she did not find Strickland to be a very good candidate when compared to either her first or second choice.

Strickland also argues a theory that the decision to deny him the transfer was controlled by Gilliard, not Jenkins. This theory is based upon undisputed evidence that Gilliard

controlled, absolutely, all personnel decisions within his authority. Strickland believes that this theory is also supported by Gilliard's March 16, 1992, response to the IUOE's inquiry regarding the appropriateness of Jenkins' interview process. According to Strickland, if Gilliard was not exercising control over Jenkins he would not have responded to the IUOE about the selection process Jenkins used.

This theory is unconvincing, however. Once the Southern California Region was divided, creating the LA Metro Region, Gilliard no longer had any control or influence over Long Beach or Jenkins. Gilliard's March 16 reply to the IUOE does not indicate control over the selection decision, but rather only that Gilliard felt the process was consistent with the collective bargaining agreement. After all, Strickland was one of Gilliard's employees and the IUOE did ask Gilliard for a response. I do not conclude that Gilliard controlled an out-of-region hiring decision simply because he responded to an inquiry about the hiring process.

The last reason this theory is unconvincing is that I am convinced, that, if Gilliard had had any influence over the decision at all, he would have done everything in his power to have Strickland transferred out of his region. Strickland speculates that Gilliard denied him the transfer in an effort to get him to quit, knowing that he had at one time considered retiring. However, this speculation is unsupported by any evidence.

I therefore conclude that Strickland has failed to prove that he was denied the transfer due to his protected activity. However, even if Strickland had proven a nexus between his protected activity and the adverse action, or if his CE I protests were protected, I find that the employer has proven it would have taken the same action despite the protected activity. I base this ruling upon a finding that Gabilan better met the stated needs of Long Beach. He had a strong electrical background, proven flexibility and dependability, and had already established a good working relationship with the clients he would be servicing as a stationary engineer.

Finally, even if Strickland's technical skills, experience, education, flexibility and dependability had been far superior to Gabilan's, the employer could legitimately have rejected Strickland based solely upon his lack of inter-personal skills and his erratic and abusive behavior. An applicant has no right to expect that a history of abusive behavior will be disregarded simply because the offensive behavior may have, on occasion, occurred in pursuit of legitimate and possibly protected issues.

For all of the above reasons, this complaint must be dismissed.

CONCLUSION

Charles Strickland engaged in protected activity over the past nine years. The employer was aware of his protected activity and took adverse action against him by denying him a transfer to Long Beach. Strickland has not proven, however, that

the transfer was denied because of his protected activity. Even if Strickland had proven that the adverse action had been motivated, in part, by protected activity, the employer would have come to the same decision despite his protected activity. Jenkins chose another candidate because that applicant was considered more dependable, flexible and possessed better interpersonal and technical skills. Strickland properly could have been rejected for the position based simply upon his history of erratic and abusive behavior.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is hereby ordered that the entire complaint is dismissed.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a request for an extension of time to file exceptions or a statement of exceptions with the Board itself.

This Proposed Decision was issued without the production of a written transcript of the formal hearing. If a transcript of the hearing is needed for filing exceptions, a request for an extension of time to file exceptions must be filed with the Board itself (Cal. Code of Regs., tit. 8, sec. 32132). The request for an extension of time must be accompanied by a completed transcript order form (attached hereto). (The same shall apply to any response to exceptions.)

In accordance with PERB regulations, the statement of exceptions must be filed with the Board itself within 20 days of service of this Decision or upon service of the transcript at the headquarters office in Sacramento. The statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing" (Cal. Code of Regs., tit. 8, sec. 32135; Cal. Code of Civ. Proc., sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

James W. Tamm

Administrative Law Judge